



DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

RIN 1205-AB61

Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program; Delay of Effective Date

AGENCY: Employment and Training Administration

ACTION: Final rule; delay of effective date.

SUMMARY: The Department of Labor is delaying the effective date of the Wage Methodology for the Temporary Non-agricultural Employment H-2B Program final rule (the Wage Rule), in order to address legislation that prohibits any funds from being used to implement the Wage Rule for the remainder of fiscal year (FY) 2013. The Wage Rule revised the methodology by which the Department calculates the prevailing wages to be paid to H-2B workers and United States (U.S.) workers recruited in connection with a temporary labor certification for use in petitioning the Department of Homeland Security to employ a nonimmigrant worker in H-2B status.

DATES: The effective date of the rule amending 20 CFR part 655, published at 76 FR 3452 (January 19, 2011), originally effective January 1, 2012, and which was previously made effective September 30, 2011, at 76 FR 45667 (August 1, 2011); delayed to November 30, 2011, at 76 FR 59896 (September 28, 2011); to January 1, 2012, at 76 FR 73508 (November 29, 2011); to October 1, 2012, at 76 FR 82115 (December 30, 2011); and to March 27, 2013, at 77 FR 60040 (October 2, 2012), is now delayed until October 1, 2013.

FOR FURTHER INFORMATION CONTACT: William L. Carlson, Ph.D., Administrator, Office of Foreign Labor Certification, ETA, U.S. Department of Labor, 200 Constitution

Avenue, NW., Room C-4312, Washington, DC 20210; Telephone (202) 693-3010 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1-877-889-5627 (TTY/TDD).

SUPPLEMENTARY INFORMATION:

The Department of Labor (the Department) published the Wage Methodology for the Temporary Non-agricultural Employment H-2B Program final rule (the Wage Rule) on January 19, 2011, 76 FR 3452. The Wage Rule revised the methodology by which the Department calculates the prevailing wages to be paid to H-2B workers and United States (U.S.) workers recruited in connection with a temporary labor certification for use in petitioning the Department of Homeland Security to employ a nonimmigrant worker in H-2B status. The Department originally set the effective date of the Wage Rule for January 1, 2012. However, as a result of litigation and following notice-and-comment rulemaking, we issued a final rule, 76 FR 45667 (Aug. 1, 2011), revising the effective date of the Wage Rule to September 30, 2011, and a second final rule, 76 FR 59896 (Sept. 28, 2011), further revising the effective date of the Wage Rule to November 30, 2011.

Thereafter, the Department extended the effective date of the Wage Rule until January 1, 2012, in light of the enactment on November 18, 2011 of the Consolidated and Further Continuing Appropriations Act, 2012, which provided that “[n]one of the funds made available by this or any other Act for fiscal year 2012 may be used to implement, administer, or enforce, prior to January 1, 2012 the [Wage Rule].” Pub. L. No. 112-55, 125 Stat. 552, Div. B, Title V, § 546 (Nov. 18, 2011) (the November 2011 Appropriations Act). In delaying the Wage Rule’s

effective date, the Department stated that although the November 2011 Appropriations Act “prevent[ed] the expenditure of funds to implement, administer, or enforce the Wage Rule before January 1, 2012, it [did] not prohibit the Wage Rule from going into effect, which [was] scheduled to occur on November 30, 2011. When the Wage Rule goes into effect, it will supersede and make null the prevailing wage provisions at 20 CFR 655.10(b) of the Department’s existing H-2B regulations, which were promulgated under Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes; Final Rule, 73 FR 78020, Dec. 19, 2008 (the H-2B 2008 Rule).” 76 FR 73508, 73509 (Nov. 29, 2011).

Accordingly, the Department determined that it was necessary in light of the November 2011 Appropriations Act to delay the effective date of the Wage Rule in order to avoid the replacement of the H-2B 2008 Rule with a new rule that the Department lacked appropriated funds to implement. As a result, the Department issued a final rule, 76 FR 73508, that delayed the effective date of the Wage Rule until January 1, 2012. Subsequent appropriations legislation¹ containing the same restriction prohibiting the Department’s use of appropriated funds to implement, administer, or enforce the Wage Rule necessitated subsequent extensions of the effective date of that rule. *See* 76 FR 82115 (Dec. 30, 2011) (extending the effective date to Oct. 1, 2012); 77 FR 60040 (Oct. 2, 2012) (extending the effective date to Mar. 27, 2013).

¹ These include the Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, 125 Stat. 786, which was enacted on December 23, 2011; Continuing Appropriations Resolution, 2013, Pub. L. No. 112-175, 126 Stat. 1313, which was enacted on September 28, 2012.

In light of the anticipated enactment of the Consolidated and Further Continuing Appropriations Act, 2013, which establishes the Department's appropriations through September 30, 2013, and also continues the prohibition of the expenditure of the Department's appropriated funds to implement, administer, or enforce the Wage Rule through September 30, 2013, *see* Sec. 1101, the Department again must delay the effective date of the Wage Rule. Delaying the effective date of the Wage Rule will ensure an orderly transition and prevent further disruption in light of the U.S. District Court for the Eastern District of Pennsylvania's March 21, 2013 ruling in *Comite de Apoyo a los Trabajadores Agricolas et al v. Solis*, 09-cv-00240, 2013 WL 1163426 (E.D. Pa. Mar. 21, 2013), in which the court vacated and granted a permanent injunction against the operation of one provision of the H-2B 2008 Rule, 20 CFR 655.10(b)(2). Under the now-vacated provision, prevailing wage determinations issued by the Department for a job opportunity for which the employer seeks H-2B workers must be based on the arithmetic mean of the wages of workers similarly employed *at the skill level* in the area of intended employment. Pursuant to that now-vacated regulation, the Department established a four-tier wage structure by dividing the Bureau of Labor Statistics Occupational Employment Statistics Survey (OES survey) wage applicable to the occupation in question into four tiers. The court vacated 20 CFR 655.10(b)(2) and remanded to the Department, giving the Department thirty days to come into compliance with the court's order.

As a result of the court's order, if a prevailing wage determination is sought based on the OES survey, the Department currently is unable to issue a prevailing wage determination under the now-vacated wage provision of the 2008 rule because the court has held invalid the four-tiered OES wage. Most of the Department's prevailing wage determinations in the H-2B program are based on the invalidated four-tiered OES wage. However, if an employer's request for a

prevailing wage determination is covered by a collective bargaining agreement, the Department still may issue that prevailing wage determination because the issuance of such determinations is unaffected by the court's order. *See* 20 CFR 655.10(b)(1). Similarly, the Department still may issue prevailing wage determinations based on the employer's submission of a private wage survey (if approved by the Department), or its voluntary use of wages set under the Davis-Bacon Act, 40 U.S.C. 276a *et seq.*, 29 CFR part 1, or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 *et seq.* *See* 20 CFR 655(b)(4), (b)(5). These alternative methodologies would be barred, however, were the 2011 Wage Rule to take effect.

Consistent with the court's ruling and order, the Department intends to promulgate a revised wage rule within 30 days of the date of that ruling that complies with the court's interpretation of what the statutory and regulatory framework require. Doing so will allow the Department to resume the normal operation of the H-2B program. Were the 2011 Wage Rule to take effect in this short time period during which DOL is preparing a revised wage rule, not only would it prevent the Department from continuing to issue the small but meaningful percentage of H-2B labor certifications that are not based on the vacated portion of the 2008 rule, but it would lead to disruption and confusion about the governing regulatory framework, as the 2011 rule would be in place and govern submissions made to the Department, but the Department would lack funds to implement that governing structure. Therefore, we are again postponing the effective date of the 2011 Wage Rule, which the Department is unable to implement as a result of Congressional action and which, if permitted to become effective, would further limit the Department's current ability to issue prevailing wage determinations.

The Department considers this situation an emergency warranting the publication of a final rule under the good cause exception of the Administrative Procedure Act. *See* 5 U.S.C. 553(b)(B), (d)(3). We are currently experiencing a significant suspension in program operations as a result of the court's order and until we promulgate a new regulation, which we intend to do in short order. In order to avoid a complete operational suspension of the H-2B program while we promulgate a new regulation (due to the continued defunding of the 2011 Wage Rule), as well as the confusion and disruption that would result from the 2011 Wage Rule briefly taking legal effect pending that new regulation, the Department finds good cause to adopt this rule, effective immediately, and without prior notice and comment. *See* 5 U.S.C. 553(b)(B), (d)(3). Any delay in promulgating this extension of the Wage Rule's effective date as the result of notice-and-comment rulemaking would significantly disrupt the program.

SIGNED: at Washington, D.C. this 26th day of March, 2013.

Jane Oates

Assistant Secretary for Employment and Training

Billing Code: 4510-FP-P

[FR Doc. 2013-07431 Filed 03/26/2013 at 5:00 pm; Publication Date: 03/29/2013]